Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-703

JAMES SINCLAIR,

Petitioner,

vs.

GLORIA ELLA SPATOCCO, alias GLORIA E. REED; WALTER ROBERT SPATOCCO, alias WALTER ROBERT REED; and ELLA W. HANSEN,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the Second Appellate District, Division One.

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Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the Second Appellate District, Division One.

Petitioner James Sinclair prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California for the Second Appellate District, Division One, as not being in accord with such applicable decisions of this Court as *Fillippon v. Albion*, 250 U.S. 76, as to the federal question of jury trial due process.

Citations to Opinions Below.

The Opinion of the Court of Appeal was ordered not to be published, and the Order of the Supreme Court of California also denied your petitioner's request for publication of said opinion of the Court of Appeal. There are printed *infra* in the Appendix the Opinion,

the Judgment, and the Order of the California Supreme Court denying hearing and denying publication.

This Court's prior vote on certiorari in this controversy is reported at 409 U.S. 886 (*Sinclair v. Spatocco*); the preceding opinion of the Ninth Circuit Court of Appeals is reported at 452 F.2d 1213 (*Sinclair v. Spatocco*).

Jurisdiction.

The Opinion of the Court of Appeal was filed June 22, 1977, and the judgment entered the same date. The petition for rehearing was filed within the 15 days thereafter and was denied July 13, 1977.

The petition for hearing by the highest state court in which a hearing could be had, the California Supreme Court, was timely filed August 1, 1977, and the order denying hearing was filed August 18, 1977.

The jurisdiction of this Court is accordingly invoked under 28 U.S.C. Sec. 1257(3).

Questions Presented for Review.

I.

Is the judgment of the Court of Appeal "without any validity" under *Pennoyer v. Neff*, 95 U.S. 714, 734, where it erred as to substantial "due process of law" in holding that it was all right for the trial court to conceal part of a note from the jury, holding it was "not incumbent on the court to inform" appellant of the major portion of the note from the jury which reflected their confusion, as a result of which concealment appellant: had stipulated erroneously to further jury instructions; had not requested proper instructions for the jury; lacked grounds to argue to

the trial judge for special verdicts; and was thereby deprived by the State in violation of the Fourteenth Amendment to the Constitution of the United States of his property in his suit and his property in his state right to full trial by jury?

II.

Is it a further denial of due process of law to base a judgment on legally incredible facts which thus do not constitute any evidence of substance?

III.

Was petitioner deprived of property by the State of California in violation of the Fourteenth Amendment to the Constitution of the United States by denial of equal protection of law and due process because of the State's furnishing as presiding appellate justices members of respondent's militant minority?

Constitutional Provisions and Statutes Involved.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The California Constitution provides:

> "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil

cause a jury may be waived by the consent of the parties expressed as prescribed by statute. In civil causes and cases of misdemeanor the jury may consist of 12 or a lesser number agreed on by the parties in open court."

Article I, Section 16.

California Code of Civil Procedure Section 614 provides:

"After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel." Enacted 1872.

California Code of Civil Procedure Section 624 provides:

"The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." Enacted 1872.

California Code of Civil Procedure Section 625 provides:

"In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly."

Statutes of California 1957, Vol. 2, page 2771, Chapter 1443.

California Civil Code Section 655 provides:

"There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good-will of a business, trade-marks and signs, and of rights created or granted by statute." Enacted 1872.

Statement of the Facts of the Case.

The basic fact of the action was that defendant Gloria Reed signed a Substitution of Attorney to be petitioner's attorney in another action when she approved petitioner's appeal draft. Upon the express representation by her that she had filed and served same and was his attorney of record, petitioner paid her over $250.00. In fact the Substitution had intentionally never been filed or served and petitioner secured no value for, or refund of, his money. Under California law this constituted a felony, grand theft by false pretenses.

Thereafter the defendants compounded their wrongs against petitioner, with substantial threats of battery and substantial threats of false arrest, with a malicious civil prosecution that was dismissed on petitioner's showings, with violations of petitioner's federal civil rights, and so forth; these actions were to enable them to get away with taking the stolen money, which money he had not even claimed back until finally suit was filed by him, as he believed Reed was still his attorney of record and had to give value in that court.

At first petitioner did not fully appreciate what was going on, and unavailingly tried to clear up the matter with them. Then he went to the State Bar which arbitrarily denied a hearing. Then he filed suit in federal court: for federal disbarment of Reed for her misconduct in a federal court case; and for substantial compensatory and punitive damages under this Court's then recent decision in *Griffin v. Breckenridge*, 403 U.S. 88, for civil rights violations and under diversity jurisdiction.

The District Court dismissed the federal action for alleged lack of jurisdiction, which was affirmed by the Ninth Circuit in a decision which refused to recognize:

> *Griffin*, petitioner's right to a jury trial, or petitioner's claim to denial of procedural due process and claim to jurisdiction under *Wilbur v. Howard*, 70 F.Supp. 930.

This Court affirmatively ordered defendants to file a Response to the petition for certiorari (No. 1279, October Term, 1971) and then denied certiorari with the Circuit Justice voting for same (*Sinclair v. Spatocco*, 409 U.S. 886).

Once federal jurisdiction was foreclosed, petitioner prosecuted his cause of action in the courts of the

State of California, being prejudiced therein by wrongful acts of defendants forcing him to trial unprepared.

Despite this, the jury voted in part for the plaintiff, but the bulk of the jury voted to deny plaintiff any recovery. The jury members were at first unable to reach a verdict and repeatedly sent questions to the judge, who read from the notes to the parties.

Only when the judge concealed from the parties the major part of a note sent from the jury were further instructions stipulated to by the parties, and in 2¼ hours further deliberation without any further questions the verdict was reached by a vote of 10-2.

Upon appeal being taken, the concealment of the jury note was first discovered by reading the note in the court's file which had been read to the court only in part by the trial judge as apparently the full jury note. Such belated discovery appears in this Court's decisions on these kinds of cases argued *infra*.

This question was argued in the briefs to all the appellate courts as the federal question of deprivation of plaintiff's property rights in his cause of action and his separate property rights under state law to trial by jury, by state denial of due process of law contrary to the Fourteenth Amendment to the Constitution of the United States. Under *Missouri v. Gehner*, 281 U.S. 313, 320, invocation of the constitutional protection "at the first opportunity" is timely enough.

Appellant's Opening Brief clearly raised the federal question at page 48:

> "X
>
> "THE STATE OF CALIFORNIA HAS DEPRIVED APPELLANT OF PROPERTY WITH-

OUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY EFFECTIVE DENIAL OF FAIR TRIAL BY JURY."

The Petition for a hearing in the highest state court repeated the federal question at page 1:

"I

"THE COURT OF APPEAL DIVERGED FROM THE PRIOR DECISIONS WHEN IT *HELD* THAT THE APPELLANT HAD NO *RIGHT* TO KNOW OF THE PART OF THE NOTE FROM THE JURY TO THE JUDGE WHICH THE TRIAL JUDGE INADVERTENTLY CONCEALED, AND WHICH CONCEALMENT IS FURTHER ARGUED TO HAVE PREJUDICED APPELLANT BY INDUCING HIM TO STIPULATE TO FURTHER JURY INSTRUCTIONS INSTEAD OF URGING PROPER JURY DIRECTIONS, ALL OF WHICH CONCEALMENT BY A STATE DEPRIVED APPELLANT WITHOUT FOURTEENTH AMENDMENT DUE PROCESS OF LAW OF HIS PROPERTY IN BOTH HIS CAUSE OF ACTION AND IN HIS RIGHT TO ALL THE INCIDENTS OF JURY TRIAL."

Both the Court of Appeal and the Supreme Court of California refused to discuss any authorities as to due process requiring that the parties to an action are entitled to know all the questions and communications from the jury, the issue being decided briefly and flatly by mere fiat without citation of authority:

"we do not think it was incumbent on the court to inform counsel concerning a portion of the

note . . . we see nothing in the court's actions which would constitute reversible error per se."

The opinion of the Court of Appeal was written by Justice Mildred Lillie. The order of the Supreme Court was signed by Chief Justice Rose Elizabeth Bird.

The Court of Appeal affirmed the judgment of the Superior Court for the defendants, denied publication of the opinion, and denied rehearing. The Supreme Court denied a hearing of the cause and denied petitioner's request for publication of the opinion of the Court of Appeal.

REASONS FOR GRANTING THE WRIT.

I.

The Importance of the Issue of Jury Trial Warrants Certiorari.

The basic reason of most importance that the Writ of Certiorari should here be granted is that there should be carefully examined any substantial claim to this Court that the fundamental jury right has been curtailed or infringed, and the claim is substantial where the state practice conflicts with the decisions of this Court as to due process.

The importance of jury trial is shown by the Bill of Rights having the 7th Amendment to the Constitution of the United States. The "due process of law" enjoined upon the states by the 14th Amendment should have as one of its vital parts civil trial by jury, beyond any state provisions for jury trial as in most or all states as a fundamentally accepted right. But since California's constitution *does* guarantee civil trial by jury as property, the denial of important incidents thereof by a state judge is unquestionably a denial of the due process of the particular state, and therefore a violation of Petitioner's constitutional rights under the Fourteenth Amendment where his property rights in his suit and in his remedies were abridged by the State.

There is another substantial question of property: Petitioner paid to the State of California $633.15 in jury fees, plus a filing fee, and when the State deprives him of his proper rights in that property *without due process*, California has again violated the Fourteenth Amendment, if not unconstitutionally impairing a contract.

Petitioner submits that where he shows prejudice from the trial court's concealing a communication from the jury, which action the highest state court affirms, he has made a substantial claim that California has wilfully curtailed the rights to jury trial and that certiorari should be granted to review the practice in populous California, as well as to show by example that the citizens of the other states are also still entitled to the historical due process incidents of fair jury trial.

This Court has found jury trial so important that it has issued the extraordinary writ of mandamus to a trial court. *Ex Parte Simons*, 247 U.S. 231. Also see *Beacon v. Westover*, 359 U.S. 500, 501.

II.

This Court Has Clearly Decided That Concealing From the Parties Questions Sent by the Jury Is a Manifold Violation of Due Process of Law.

In the case of *Fillippon v. Albion*, 250 U.S. 76, 82, the court reversed and stated that the parties, besides the bare right to a jury, also have the right "to direct the mind of the trial judge" at the time of these jury questions, "the right to be heard" (p. 81) for due process of law.

Shields v. United, 273 U.S. 583, 588-589, cites this and amplifies it to note the parties have a right to be present, *effectively* present, during the entire jury trial; both cases approved in recent *Rogers v. United States*, 422 U.S. 35, 38-39, where (41) (as here) the court later put the jury note into the record without counsel knowing everything that transpired. Such a right being denied or forestalled by concealment is a miscarriage of justice by any definition.

These very citations were presented in the petition for hearing by the California Supreme Court, and apparently ignored. The opinion of the Court of Appeal appears to ignore Topic X of Appellant's Opening Brief, headed:

> "THE STATE OF CALIFORNIA HAS DEPRIVED APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY EFFECTIVE DENIAL OF FAIR TRIAL BY JURY"

and Topic IV of Appellant's Petition for Rehearing headed:

> "OTHER TOPICS MAY BE STATED FIRST, BUT THIS IS A PRIMARY TOPIC
>
> THE OPINION STATES A MONSTROUS AND INCORRECT RULE OF LAW WHERE IT *HOLDS* THAT THE TRIAL JUDGE MAY CONVERSE WITH THE JURY WHILE KEEPING THE PARTIES OUT OF THE COURTROOM AND IGNORANT OF THE CONVERSATION
>
> SUCH A RULE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS VIOLATING THE STATE CONSTITUTION."

In a suit between private parties, like *Pennoyer v. Neff*, 95 U.S. 714 (a law school textbook case, no less), where a state court errs as to substantial "due process of law" (p. 734), the judgment is since (p. 733) "the adoption of the Fourteenth Amendment to

the Federal Constitution" "without any validity" (p. 734), AFFIRMING the judgment (p. 736) of the federal circuit court (pp. 715, 720-722) that Pennoyer could recover his land as the preceding *state* circuit court judgment (p. 719) for money and execution against the land of Pennoyer was invalid for lack of due process of law. Another private party case was reversed for substantial denial by a court "contrary to fundamental principles of justice" (p. 426) of "due process of law" (p. 423) in *Coe v. Armour*, 237 U.S. 413.

III.

The State Court Clearly Erred as to the Jury Note, and Certiorari Should Issue to Correct a Miscarriage of Justice.

The Court of Appeal discussed the jury note on 4 pages of its opinion. *Infra* petitioner will show that there was no substantial evidence for the verdict so that the judgment was a further denial of due process, but here petitioner will show how the erroneous judgment came to pass.

The opinion tries to show that the concealed part of the jury's note was completely irrelevant and petitioner could not have been prejudiced by the concealment. However, one answer to this attempt is an illustrative California case, *Redman v. Gulnac*, 5 Cal. 148, that the importance to the trial of the entire note is seen "from the very fact that the jury" saw fit to write it!

It was in the note precisely because the jury was confused and had previously been sent back by the trial judge (R. 88-97), and the jury was trying as best they could with their limited ability to explain

their problem to get helpful instructions from the court. *Bartosh v. Banning,* 251 Cal.App.2d 378, note 11. The unread portion of the note clearly called "for a response" from the court and plaintiff, at least special verdicts which the Court of Appeal refused to consider on Petition for Rehearing or opening brief. The full note had to be disclosed to permit compliance with California Code of Civil Procedure Section 614 as to giving the full "information *required*" by them (emphasis added to quotation) "in the presence of . . . the parties".

The opinion of the Court of Appeal goes on to admit that the concealed part of the jury note shows the jury's confusion as to dates, exhibit numbers, and whether something was hearsay or admissible evidence. Petitioner respectfully argues that the lower court strains much too hard to try to affirm the judgment.

If the jury demonstrated not only

(1) continuing confusion as to what effect the filing of the substitution form would have on the duty of defendant Reed, when *the* issue was instead that the representation that it had been filed was falsely made to get money from the plaintiff,

but also

(2) confusion all over the place as to exhibits and evidence,

then petitioner would have asked with good grounds for special verdicts to assure that the jury general verdict was not "against law", that the real facts found by the jury were not "inconsistent with the general verdict" as stated in California Code of Civil Procedure Section 625.

The trial judge, Judge Richard Schauer, does give these special interrogatories to juries: *Oakes v. McCarthy,* 267 Cal.App.2d 231, 267, 237. Under *Fillippon v. Albion,* 250 U.S. 76, 82, 81, petitioner had the due process *right* "to direct the mind of the trial judge" at the time of the jury questions, "the right to be heard", the right to be *effectively* present at the jury trial. Judge Schauer, like his father before him, is a respected jurist who would not want to prejudice a party and it is felt that if the matter had been realized before the trial court lost jurisdiction that a new trial would have been granted. By the nature of the concealment it could not be discovered in time, somewhat like *Rogers v. United States,* 422 U.S. 35, 41.

The salutary purpose of special verdicts in California is scholarly discussed in *Plyer v. Pacific,* 152 Cal. 125, 130-132. Because of lack of special verdicts we have no idea what the jury found really as to the facts of this case, which will become important later upon discussion that there was no substantial evidence for their general verdict.

The Court of Appeal's opinion tries to blame the petitioner for stipulating "to the answer given by the court" to the jury and for not requesting "any limiting instructions" on hearsay, the court wrongfully refusing to admit that these things happened because of the very concealment of the jury note and not because of petitioner's fault. The jury further seems to have thought erroneously that petitioner vouched for the truth of all the statements in petitioner's exhibits, some of which were defendant's lies to be used to impeach her; the concealment of the note therefore prohibited

him from securing a special verdict or securing instructions to clear up that question or even securing knowledge the jury was going so far wrong.

IV.

The Judgment Denies Petitioner Due Process Because It Is Based on Legally Incredible Facts Which Thus Do Not Constitute Substantial Evidence.

A judgment must be based on some evidence, of some legally recognizable substance, enough to warrant denial of a motion for directed verdict against the evidence, or the judgment violates due process of law. *Thompson v. Louisville,* 362 U.S. 199.

In this case at bar the evidence on which the judgment was based (due to the aforesaid errors of the trial court which prevented Petitioner from properly presenting his facts, his arguments, and his instructions of law) was the testimony of defendant Spatocco-Reed that she did *not* say she had filed the Substitution of Attorneys already.

The basis of plaintiff's case was that Reed *had* said she had filed the paper, and thus secured money from plaintiff feloniously under false pretenses of fact.

Obviously the jury arrived at the wrong verdict by confusion; at this place in the Petition, however, it is up to the Petitioner to show to the Court not that error, but that in fact there was no substantial evidence for the judgment.

This is to be done under adequate legal precedent by showing Reed's evidence was legally incredible (and thus not substantial evidence) as in *Estate of Baldwin,* 162 Cal. 471, 478; *Herbert v. Lankershim,* 9 Cal.2d 409, 471, 472, 474; *Crawford v. Continental,* 261 Cal. App.2d 98, 103.

The legal incredibility:

(1) was shown in great detail in Petitioner's briefs in the appellate court below

(2) as befit the facts, the incredibility was not contradicted by Reed's brief (nor did she argue), although she did make general contention that the substantial evidence rule existed

(3) and, by the appellate court, the incredibility was held not to be incredible, as:

> "the jury could have reasonably believed . . . that the substitution of attorney form was signed to be filed by plaintiff when Mrs. Reed gave her approval."

It is respectfully argued to this honorable Court that as a matter of law that it is preposterous and legally incredible:

(1) that a *client* is supposed to file the Substitution in of his new attorney; and

(2) that a fully signed (and delivered, by also signed copy!) Substitution of preceding third party lawyer is not immediately valid *by its own terms.*

("I accept the foregoing substitution. /s/ Gloria E. Reed", see Exhibit 1 in Appendix *infra.*)

Yet this is the only defense for Mrs. Reed the lady judge writing the opinion could find against the compelling argument made by your Petitioner. It seems that co-militant lady lawyers have a long way to go to come up to the legal and moral standards of the male bar.

The true facts obviously were that Reed did secure money from Petitioner based upon material false representations that the Substitution had been filed, but that Reed destroyed the copies she had and never filed them, and thought she could get away with it as she clumsily forgot she had given one of the many copies to Petitioner and thought her word as an attorney would be sufficient to secure at least a stand-off if not a victory for her in any dispute.

In fact, she has won so far: the U.S. District Court refused even to take jurisdiction of disciplining her (*Sinclair v. Spatocco,* 409 U.S. 886, Petition there, page 2, Question III) and none of the state authorities have brought her to a Bar hearing or other justice.

The Opinion below does note Reed in deposition under oath falsely denied even signing any Substitution, but admitted much later at trial she had signed it (when surprised to see Petitioner's signed copy thereof), and does note that Reed committed other lying under penalty of perjury. This corroborates the "true facts" immediately *supra*. The Opinion notes no such impeachment of the plaintiff's testimony or the lie detector test (Appendix, *infra*).

V.

Members of Respondent's Militant Minority Deprived Petitioner of Property in Violation of the Fourteenth Amendment.

Petitioner hopes that in the text immediately preceding that he has shown how preposterous was the defense of Reed by the lady lawyers on the California bench(es). Mildred Lillie wrote the Opinion. Rose Elizabeth Bird signed the Order denying hearing in the California Supreme Court. This Court may appropriately take judicial notice of the militancy expressed

by lady lawyers, the frequent press accounts of lady judges being lionized and given awards by the female bar and liberationists, etc.

It is respectfully argued that, like in *Tumey v. Ohio,* 273 U.S. 510, 532, even though honorable judges may be able to overcome biases, it is a denial of due process to a party to have as any sort of judge, even on appeal (although, this is where the jury concealment first came to light, and was decided), a judge who reasonably *appears* subject to such personal or extreme bias.

Even if the judge were to try to bend over backward to be non-biased (thereby injuring the opposite party), he might then try to counter *that* bias and end up still biased in the original direction.

It is, as in *Tumey,* page 532, too much to expect in general "of the average man . . . to hold the balance nice, clear and true" in this kind of circumstance which "denies . . . due process of law"; "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice".

An attack on Reed could be taken personally as an attack on all lady lawyers, and few judges could resist trying vicariously to defend themselves (or their fellow female judge.) by trying to find some kind of defense for their sister. The proof is in the decision itself, "res ipsa loquitur".

There is no practical way in California to disqualify appellate judges for this bias which amounts to a fundamental deprivation by the State of property contrary to the Fourteenth Amendment to the Constitution

of the United States in the rare particular kind of case this one is.

A mere attempt so to disqualify would inescapably prejudice the party before the remainder of the close-knit appellate bench, and one does not know under California practice the composition of the court until oral hearing when they have already read the record and briefs and prejudged the case when the panel is presented to the parties and states it wishes to hear no argument.

It is seen that the Opinion was repeatedly denied publication; as it is said of doctors that "they can bury their mistakes", California women judges can hide their faulty opinions from the informed scrutiny of general legal researchers among the bar and general public by non-publication.

Conclusion: Summary Reversal of the Judgment by This Court Is Warranted.

Upon futile or non-existent Response to this Petition for Certiorari by Respondents, it will be seen that the judgment clearly on its face as to allowability of concealment of jury note from a party is a wrong judgment, and that the constitutional issue of full due process incidents of jury trial being preserved well merits Certiorari, and that therefore Summary Reversal of the judgment below is warranted for a proper jury trial to arrive at a just judgment.

November, 1977.

Respectfully submitted,

JAMES SINCLAIR,

Petitioner Pro Se.

APPENDIX

APPENDIX.

Judgment.

In the Court of Appeal, Second Appellate District, State of California.

James Sinclair, Plaintiff and Appellant, v. Gloria Ella Spatocco, et al., Defendants and Respondents. No. 50324. S.C. No. C 950471.

On Appeal from the Superior Court in and for the County of Los Angeles.

The above-entitled cause having been fully argued, submitted and taken under advisement, it is ordered, adjudged and decreed *by the Court that* the judgment is affirmed. Respondents to recover costs.

I, CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the foregoing is a true copy of an original judgment entered on June 22, 1977, and now remaining of record in my office.

Dated: Aug. 24, 1977.

CLAY ROBBINS, JR., *Clerk*
By /s/ V. Carey, *Deputy*

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

James Sinclair, Plaintiff and Appellant, v. Gloria Ella Spatocco, alias Gloria Ella Reed; Walter Robert Spatocco, alias Walter Robert Reed; and Ella W. Hansen, Defendants and Respondents. 2d Civil No. 50324, (Super. Ct. No. C-950471).

Filed: June 22, 1977.

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Schauer, Judge. Affirmed.

James Sinclair, Plaintiff and Appellant in propria persona.

Gloria E. Reed, for Defendants and Respondents.

Plaintiff appeals from judgment entered on jury verdicts in favor of defendants in an action for, inter alia, fraud, breach of contract, assault, civil rights violations, and conspiracy to defraud.

The appeal comes to us on a "Certified Statement in Lieu of Transcripts."[1] We describe the outlines of the action as revealed in the summary of testimony in this document, proceeding to more detailed discussion of facts as appropriate in the context of appellant's numerous complaints of error.

Plaintiff was involved in an appeal before the Ninth Circuit Court of Appeals; he was represented by counsel. According to his testimony, he approached Gloria Reed for the purpose of substituting her as attorney

[1]Pursuant to California Rules of Court, rule 12, we have augmented the record with the superior court files related to this action. (See fn. 3, *post*.)

of record in this action. He claims to have been competent to represent himself, but for fear of being served with process in a related state action should he do so, he did not; instead, he agreed with Mrs. Reed that he would prepare whatever briefs and documents were needed for her to review and to enable her to familiarize herself with the issues to be presented at oral argument in federal court, the rate of pay to be $15 an hour. He introduced at trial a copy of a substitution of attorney form bearing what was stipulated to be Mrs. Reed's signature. He stated that Mrs. Reed had promised to file, but never filed such a document in federal court.

Plaintiff testified that Mrs. Reed later sought to withdraw from this employment. He objected that the money he had paid ($273) would have been wasted if she withdrew. Mrs. Reed contacted another attorney to see if he would take the case on the same terms, but he declined. Ultimately plaintiff had to find another attorney to take over the case.

Following Mrs. Reed's withdrawal from employment, plaintiff learned that the substitution of attorney form had not been filed, and that Mrs. Reed was not a member of the bar of the Ninth Circuit. He made efforts to get his money back, including a visit to the Reed home where Mr. Reed reportedly said "I ought to hit you," thus giving rise to the assault theory. Plaintiff also testified that Mrs. Reed had tried to have him arrested after this incident.

Mrs. Reed did not remember signing the substitution of attorney form. She denied that plaintiff had left any copies of it with her, or that she had promised to file it. She said that she had agreed to assist him

in preparing his legal documents, but that she would not become his attorney of record until she was satisfied that the appeal was meritorious and the appellate brief was in proper form, and that if she so decided, a fee for that service would be negotiated.

As to the incidents following the decision to terminate the relationship, Mrs. Reed testified that plaintiff began following her, so that she was apprehensive when he appeared at her home. According to her, he stuck his foot in the door and refused to leave until he spoke to her. Mrs. Reed told him to leave or she would call the police, and her husband approached and told him to get out. She and her husband then followed plaintiff in order to obtain his automobile license number. She said that the money she had received from plaintiff was reasonable for the services she had performed for him.

Appellant's first contention is that there was no substantial evidence to support the verdicts for defendants. He concedes that "The crucial issue was the credibility of the two opposing witnesses," but argues that the testimony of Mrs. Reed was so lacking in credibility as not to amount to substantial evidence. He recites a number of real or supposed contradictions or inconsistencies in her testimony—in her deposition she denied having signed a substitution of attorney form but agreed at trial that such a form (Exh. 1) bore her signature explaining she did not remember signing it; she testified she had never lied under penalty of perjury, but a copy of her driver's license showed she had misstated her date of birth. Neither these nor the other points relied on by appellant render Mrs. Reed's testimony so incredible as to be incapable

of supporting the jury verdicts. There is nothing inherently improbable about the facts as related by Mrs. Reed. The jury could have reasonably believed that she had agreed to act as attorney of record only when satisfied of the merits of the appeal and the state of the appellate brief, and that the substitution of attorney form was signed to be filed by plaintiff when Mrs. Reed gave her approval. The money paid, at the rate of $15 an hour, reasonably could have been found to be paid Mrs. Reed for her services in supervising preparation of the documents prepared by plaintiff.

As to the cause of action for assault against Walter Reed, the jury might have concluded that the statement, "I ought to hit you" was "mere words" not sufficient to put plaintiff in reasonable apprehension of an imminent harmful or offensive contact with his person (see Prosser, Law of Torts [4th Ed., 1971] § 10, pp. 39-40), or that any such statement was justified in view of plaintiff's forcibly placing himself in the doorway of the Reed home and refusing to leave. Matters going to credibility of a witness and to apparent inconsistencies, discrepancies, or contradictions of his testimony are for consideration of the trier of fact, and its acceptance of testimony which cannot be said to be inherently improbable or impossible of belief is controlling on appeal. (*Otten v. Riesener Chocolate* Co., 82 Cal.App. 83, 87.)

Appellant further contends that the court erred in denying his motion for new trial, the primary basis of which was insufficiency of evidence. The gist of this contention is that the court failed in its duty to review the evidence and reach an independent con-

clusion as to whether the verdicts were supported thereby. According to the narrative summary of the court proceedings in the "Certified Statement," "The motion for new trial was submitted without argument on the moving papers alone; the trial judge stated he would take the motion under submission to see if there were substantial evidence for the jury's verdict, having reference to the file and his notes and his reporter. The court denied the motion on May 22, 1974, without examining the trial exhibits on this motion."

As to examining the exhibits, we presume that the court familiarized itself with their contents at trial, and that this would be reflected in the court's notes. The presumption that official duty has been regularly performed (Evid. Code, § 664) impels us to conclude that the court's consultation of the file, notes, and reporter was adequate for it to undertake an independent examination of the evidence. A more serious question is whether the court properly conceived the standard to be applied in passing on the motion. In passing on a motion for new trial grounded on insufficiency of the evidence, the trial judge is required to undertake an independent appraisal of the evidence. (Code Civ. Proc. § 657; *Dietrich v. Litton Industries, Inc.*, 12 Cal.App.3d 704, 717.) Appellant asserts that the court's reference to "substantial evidence" indicates, as in *Lippold v. Hart*, 274 Cal.App.2d 24, that the court failed in its responsibility.

It is true that in *Lippold*, judgment was reversed where "The trial judge's comments indicate[d] that, although he made an independent evaluation of the evidence, he failed to base his decision on the motion for a new trial upon that evaluation." (274 Cal.App.2d

at p. 26.) But *Lippold* represents an exception to the general rule that the reasons given by a trial judge for his decision on a motion for new trial may not be relied upon by an appellate court to reverse the judgment below. (See *Yarrow v. State of California*, 53 Cal.2d 427, 437-439.) Unlike the situation in *Lippold*, the court's comments here do not show that the court deferred to the jury's evaluation of the evidence. Indeed, we really know nothing of what the court actually said.[2] Not every use of the term "substantial evidence" need refer to what is known as the substantial evidence rule. Reference to reviewing the jury's verdict to determine whether it was supported by "substantial evidence" well may be only an elliptical way of framing the provision of Code of Civil Procedure section 657 that the motion should not be granted unless the court determines after its review that the jury "clearly should have reached a different verdict."

Appellant bases several contentions on the court's inadvertent concealment of a portion of a note from the jury. The jury had presented a first note asking "Is this document [plaintiff's Exhibit 1, substitution of attorney form] legal and binding as of February 13, 1968, or date of recording between Mr. Sinclair and Mrs. Reed even though it wasn't mailed and received in the Ninth District U.S. Court of Appeal?" After discussion with counsel, during which plaintiff, on request, was shown the note, the court instructed the jury to reformulate its question inasmuch as it was considered ambiguous as written. The second note

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[2]The record presented on this appeal—"Certified Statement"—has proved to be troublesome. Apparently there were at least six proposed Statements presented to the trial court, and the final result may have been achieved largely through attrition.

from the jury read: "Is Mrs. Reed Mr. Sinclair's attorney based on Exhibit I as of 2-13-68 or is she his attorney only after the substitution is recorded & filed in the U.S. Court of Appeals? [¶] Par. 5,[3] Exhibit 2, 11-18-68 states Mrs. Reed would be his attorney of Record at the time when she was thoroughly familiar with the case cited and approved the brief prepared by Mr. Sinclair and she would make the appearance to argue his contentions at the appellate hearing." In discussing it with counsel the court did not read the second paragraph aloud. There was no request to see the note. It was agreed that the court answer, and it did, as follows: "'. . . an attorney does not become an attorney of record until the substitution of attorney is filed with the court, but that the execution of the substitution of attorney is evidence going to issues in the case which the jury is to decide and an attorney can become an attorney for a client but not in a court case.' [¶] In other words, for purposes other than being in a particular court case."

Appellant claims that inasmuch as Exhibit 2 (a copy of Mrs. Reed's driver's license) contained no paragraph 5 such reference indicates confusion on the part of the jury which should have been clarified; that the reference suggests the jury considered as evidence something not admitted into evidence, and that he was wrongly deprived of notice and an opportunity to respond to the jury's perception of the exhibit to which it referred.

It is true that Exhibit 2 has no paragraph bearing the number 5, but the note also gives the date of

[3]Appellant misreads the jury's note, mistaking a handwritten numeral "5" for the letter "J." When we state his arguments in this connection, we substitute "5" for "J."

the exhibit as 11-18-68, which indicates that the intended reference was to plaintiff's Exhibit 11, a copy of a letter from Mrs. Reed to Mr. Stovitz of the State Bar. That there was no paragraph 5 identified as such on the letter, suggests only that the jury adopted its own reference method for the exhibits; the statement referred to is in the fifth paragraph of the letter. Of course, it was hearsay, but the letter was introduced by plaintiff and the record does not indicate that he requested any limiting instruction with respect thereto. Further, Mrs. Reed made substantially the same statement in her testimony, and at that time plaintiff had every opportunity to respond to it.

The portion of the note which the court did not read to counsel was not a question; it did not call for a response. Why it appeared in the note is uncertain. Perhaps if plaintiff had asked to see the note this would have been permitted. However, we do not think it was incumbent on the court to inform counsel concerning a portion of the note which might reflect some of the thinking of the jury to that point. Certainly we see nothing in the court's actions which would constitute reversible error per se.[4]

Appellant asserts that the trial court erred in refusing to take judicial notice of the records of the Ninth Circuit Court of Appeals in order to show that Mrs.

[4]Appellant also argues that the jury's interest in the effective date of the substitution demonstrates a misapplication of the law on which instructions were given, as the effective date was irrelevant to the issues of the case. Appellant did not raise any such objection when the jury question was being discussed. Indeed, he stipulated to the answer given by the court thereby inviting error, if any. It seems, however, that the jury correctly considered that the effective date of substitution as attorney of record was relevant to the nature of the agreement entered into by the parties.

Reed had not been admitted to the bar of that court. Plaintiff proposed that the court, at his expense, telephone the clerk of the Ninth Circuit for this information. The request was properly denied.

Judicial notice of the records of the Ninth Circuit was discretionary under Evidence Code section 452, subdivision (d). In order to convert this discretionary act into a compulsory one, plaintiff was obliged to comply with the requirements of section 453. "A court is *not required* to seek out on its own initiative indisputable sources of information, in order to take judicial notice of a matter requested by the party. The party making the request has the obligation to supply the court with the source material needed to enable the court to determine (1) that the matter is a proper matter for judicial notice under Evid. Code, § 452, and (2) the tenor of the matter to be judicially noticed. [¶] . . . If the information supplied is *not* sufficient, the trial judge is entitled to refuse to take judicial notice of the matter requested." (Jefferson, Cal. Evidence Benchbook, (1972) § 47.4, pp. 844-845, original emphasis.) The offer to pay the cost of the telephone call was inadequate for the purpose.

Appellant considers the court's rejection of his requested instructions numbered 5, 7, 9, and 11, and the modification of his requested instruction number 3 to have been error. Plaintiff's requested instructions 5 and 7 were designed to inform the jury that certain conduct of defendants, allegedly fraudulent, if proven would also constitute criminal conduct. These instructions were properly rejected as the question of possible criminal liability of defendants was completely irrelevant to their potential civil liability to plaintiff. Proposed instruction 11 which defined a threat or challenge

to fight as disturbing the peace was similarly objectionable. Further, plaintiff's attempt to equate disturbing the peace with assault was mistaken in its inception, and there was no error in failing to submit a verdict form based on this theory to the jury. Plaintiff's number 9: "A person damaged by an illegal act is entitled to damages therefor," was a reformulation of Civil Code section 3281. There was no error in rejecting the instruction inasmuch as the jury was otherwise instructed that if it rendered a verdict for plaintiff it must award him damages in an amount which would compensate him for claimed loss or harm proximately resulting from defendants' tort (BAJI No. 14.00), and further, as to how much damages should be determined.

The modification of plaintiff's number 3 caused him no harm. The instruction as proposed read: "You are instructed that an attorney has the duty to preserve his client's secrets at every peril to himself," and was modified to read "An attorney is in a confidential relationship with a client and generally has the duty to preserve his client's secrets." Even if the difference is deemed significant, it appears that the instruction was requested based on plaintiff's theory that Mrs. Reed's alleged disclosure of his secrets, actual or threatened, was one form of damage inflicted by the conspiracy alleged by him. Inasmuch as the jury found no conspiracy and no damages, the instruction lost all importance.

The last of appellant's contentions[5] is that the court erred in failing to compel further answers to interrog-

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[5]Appellant also raises two objections relating to an action for declaratory relief brought by him while the suit for damages was pending. This action, No. C 75409, was consolidated with

(This footnote is continued on next page)

atories directed to Gloria Reed. The court denied the motion to compel as untimely under Code of Civil Procedure section 2030, subdivision (a). Appellant implicitly concedes the motion was untimely unless Mrs. Reed had waived or was estopped to assert the 20-day time limit then applicable. According to plaintiff's unanswered declaration in support of the motion, counsel for defendants had waived time to compel further answers with respect to interrogatories directed to Walter Reed and Ella Hanson. It is essentially this that appellant cites as giving rise to a "reasonable belief" that there had been waiver regarding the interrogatories addressed to Gloria Reed. We perceive no waiver. Appellant's claim of estoppel is based on the theory that defendants' counsel did not disabuse him of the belief that time had been waived for Mrs. Reed. This is insufficient to raise an estoppel notwithstanding appellant's claim that the belief was fostered by opposing counsel.

Even if the court's failure to compel further answers were erroneous, it is difficult to see how appellant could be prejudiced thereby. The motion was denied as untimely on January 10, 1974. The case did not come

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the within action, No. C 950471, for trial on the court's own motion. The action sought a declaration that the five year period of Code of Civil Procedure, section 583, subdivision (b) on the within action was tolled by a related federal suit. The action was dismissed by the court on March 26, 1974, when defendants stipulated to waive the time. Appellant did not see fit to inform us of these facts. We do not consider any questions relative to the disposition of No. C 75409 because (1) it appears that plaintiff was effective in getting what he sought in the action, (2) the actions were not actually tried together so plaintiff should have appealed from the order of dismissal, which he did not do, and (3) plaintiff's notice of appeal designated only No. C 950471, and was not timely for No. C 75409, in which the notice of dismissal was sent to him on April 8, 1974.

to trial until March. There was nothing to prevent plaintiff from serving Mrs. Reed with additional interrogatories and filing an unquestionably timely motion to compel further answers if he believed the answers to be inadequate. While rulings on discovery matters are reviewable on appeal from the judgment, "appellate courts are much more reluctant to overturn the judgment of a trial court after the full trial of the action because of a procedural error unless such error is so prejudicial it constitutes a miscarriage of justice." (*Woolridge v. Mounts,* 199 Cal.App.2d 620, 628-629.) That does not appear to be the case here.

The judgment is affirmed.

Lillie, *J.*

We concur:

Wood, *P. J.*

Hanson, *J.*

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 1, Civil No. 50324.

In the Supreme Court of the State of California, in Bank.

Order Due August 19, 1977.

Sinclair v. Spatocco, Etc., et al.

Filed: Aug. 18, 1977.

Appellant's petition for hearing DENIED.

The request for an order directing publication in the above entitled cause is DENIED.

/s/ Bird
Chief Justice

EXHIBIT 1.

Substitution of Attorney.

Gloria E. Reed
5012 Eagle Rock Boulevard
Los Angeles, California 90041
257-8285
Attorney for Plaintiff and Appellant

United States Court of Appeals, for the Ninth Circuit.

James M. Sinclair, Jr., Plaintiff, vs. Anna Roza Boughton, etc., Defendant. No. 22005.

Admitted In Evidence: March 26, 1974.

Appellant James M. Sinclair, Jr., hereby substitutes Gloria S. Reed, 5012 Eagle Rock Boulevard, Los Angeles, California 90041, telephone 257-8285, as his attorney of record in this action in place of Phill Silver.

Dated: February 13, 1968.

/s/ James M. Sinclair, Jr.
James M. Sinclair, Jr.

I consent to the foregoing substitution.
/s/ Phill Silver
Phill Silver

I accept the foregoing substitution.
/s/ Gloria E. Reed
Gloria E. Reed

[Letterhead]
VIC COCHRAN
Detective Agency
6230 West 85th Place
Los Angeles, California 90045
(213) 776-1893
California Association
Polygraph Examiners
California Association
Licensed Investigators
5-12-70

TO WHOM IT MAY CONCERN:

On the above date I gave a polygraph (lie detector) exam to Mr. James M. Sinclair, 2980 Davison, Detroit, Michigan. The exam was given to Mr. Sinclair, at his request, to determine if he was truthful in the complaint he filed against Attorney Gloria Reed.

The exam was conducted at the above location with no one present except Mr. Sinclair and myself.

The exam was given on a Stoetling Polygraph, model #22500 which consists of three components measuring blood pressure-pulse, breathing and skin resistance.

During the exam all three indices were used. The following relevant questions were asked of Mr. Sinclair during the exam:

1. Are all the facts in the complaint you filed against Gloria Reed basically true? ANSWER — YES.
2. Did Gloria Reed tell you she was going to work for the City of Glendale? ANSWER — YES.
3. Did Gloria Reed state to you that she had filed the substitution of attorney? ANSWER — YES.
4. Did Gloria Reed approve of your final draft of a motion which you wrote? ANSWER — YES.

It is my opinion, based on the results of the exam, that Mr. Sinclair was TRUTHFUL in his answers to the above questions. The polygraph chart is available at this office for any interested parties.

Respectfully,
/s/ V. R. Cochran
V. R. Cochran

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